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Supreme Court of the United States

MEMORANDUM OF INTERVENOR-APPELLEES SOUTH
EASTERN CENTRAL LINES IN REPLY TO MEMORANDUM OF
THE UNITED STATES AND MOTION TO AFFIRM
OF THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
I. The Commission's Orders Are Not Invalid for Failing to Explain Their Omission of Sections Four, Five, and Nine of the Washington Agreement	2
II. There Is No Warrant for a Summary Affirmance on the Basis Now Suggested by the Commission	8
III. The United States and the Commission Correctly Urge That Appellant's Technological-Innovation Issue is Without Substance	11
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Addison v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944) 13

Brotherhood of Maintenance of Way Employes v. *United States*, 366 U.S. 169 (1961) 10, 12

Fidelity Cotton Oil Co. v. *Alabama & V. Ry.*, 47 I.C.C. 542 (1917) 5

Gateway Transp. Co. v. *United States*, 173 F. Supp. 822 (W.D. Wis. 1959) 6

In re Florida E.C. Ry., 171 F. Supp. 512 (S.D. Fla. 1959) .. 13

J. H. Nowinsky Trucking Co. v. *United States*, 195 F. Supp. 748 (W.D. Wis. 1961) 6

King Van Lines, Inc. v. *United States*, 220 F. Supp. 551 (D. Kan. 1963) 6

Macy v. *Kendall*, 209 F. 2d 250 (Em. App. 1954) 11

Minneapolis & St. L. Ry. v. *United States*, 361 U.S. 173 (1959) 2

Monumental Motor Tours, Inc. v. *United States*, 110 F. Supp. 929 (D. Md. 1953) 7

NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) 13

Southern Ry. v. *United States*, C.A. 3276, E.D. Va. 1, 11, 13

T.C. Wheaton Co. v. *Baltimore & O.R.R.*, 139 I.C.C. 636 (1928) 5

United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) 5, 6, 7

W.J. Dillner Transfer Co. v. *United States*, 101 F. Supp. 506 (W.D. Pa. 1951), *aff'd per curiam*, 344 U.S. 883 (1952) 6

Statutes, Rules, and Treatises: Page

Administrative Procedure Act § 8(b), 5 U.S.C. § 1007(b) ..2, 3, 7
3 Davis, *Administrative Law Treaties* § 20.06, at 92 (1958) .. 6
Interstate Commerce Act § 5(2), 49 U.S.C. § 5(2) 2, 10, 12, 13
———, § 5(2)(f), 49 U.S.C. § 5(2)(f) 8, 9, 10, 11, 12, 13
———, § 17(9), 49 U.S.C. § 17(9) 6
Interstate Commerce Commission Rules of Practice § 1.96(a), 49 C.F.R. § 1.96(a) 4, 6
———, § 1.101(d), 49 C.F.R. § 1.101(d) 5, 6
———, former R. 96(a) 6
———, former R. 101(d) 6

Supreme Court of the United States

OCTOBER TERM, 1964

No. 130

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES, *Appellee,* and

INTERSTATE COMMERCE COMMISSION, SOUTHERN RAILWAY COMPANY, and CENTRAL OF GEORGIA RAILWAY COMPANY, *Intervenor-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MEMORANDUM OF INTERVENOR-APPELLEES SOUTHERN AND CENTRAL IN REPLY TO MEMORANDUM OF THE UNITED STATES AND MOTION TO AFFIRM OF THE INTERSTATE COMMERCE COMMISSION

Southern and Central remain of the opinion that the ends of justice will be best served by deferring consideration of the Jurisdictional Statement until the Court below has decided the closely related case of *Southern Ry.* v. *United States*, C.A. 3276, E.D. Va. The United States and the Interstate Commerce Commission, however, have suggested two separate and con-

flicting bases for disposing of the Jurisdictional Statement summarily. It seems appropriate for Southern and Central to comment on these suggestions, in order that their views may be before the Court in the event their Motion to Defer Consideration of the Jurisdictional Statement is not granted.

I. THE COMMISSION'S ORDERS ARE NOT INVALID FOR FAILING TO EXPLAIN THEIR OMISSION OF SECTIONS FOUR, FIVE, AND NINE OF THE WASHINGTON AGREEMENT

The United States in effect moves that the judgment of the District Court be vacated and the cause remanded to the Commission. Its position is that if the Commission did decline to impose as labor conditions the provisions of Sections 4, 5, and 9 of the Washington Agreement, its Order was invalid because no reasons were given for this action. It may be conceded that the Commission's first two Reports contain no express reference to these provisions of the Washington Agreement. Indeed, that fact is clear evidence in support of Southern's and Central's position that those provisions were not imposed. But it by no means follows that the Reports must be set aside because of this omission.

The argument of the United States rests upon the rule that requires an administrative agency to state clearly the reason or basis for its order (U.S. Memorandum, pp. 13-14). This rule of law is now codified in Section 8(b) of the Administrative Procedure Act, 5 U.S.C. §1007(b), which this Court has held applies to Section 5(2) proceedings before the Interstate Commerce Commission. *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 192 (1959). That statute provides, in pertinent part:

> "Prior to each . . . decision upon agency review of the decisions of subordinate officers the parties shall be afforded a reasonable opportunity to submit . . . (2) exceptions to the decisions or recommended decisions of subordinate officers . . ., and (3) supporting reasons for such exceptions . . . . The record shall show the ruling upon each such . . . exception presented. All decisions . . . shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . . ."

The last sentence of this Section requires that an agency reveal its "findings and conclusions, as well as the reasons or basis therefor." But this requirement by its terms applies only to "material issues . . . presented on the record." And the second sentence of Section 8(b) requires that a ruling be shown "upon each . . . exception presented." Both these provisions should be construed in light of the Section's first sentence, which gives parties a chance to present "exceptions to the decisions or recommended decisions of subordinate officers." It is evident that an agency must give reasons for its disposition of an issue only if that issue has been properly "presented" to it, whether by "exceptions" to a recommended decision of a hearing examiner, or as otherwise appropriate under the agency's rules of practice.

Under these governing standards, the Commission was never under a duty to rule on the inclusion of Sections 4, 5, and 9 of the Washington Agreement in its labor conditions, because no request for their inclusion was ever properly before it. In the first stage of the administrative proceedings RLEA raised questions with respect to these provisions of the Washington

Agreement, but thereafter it failed to take steps necessary to preserve these questions for Commission consideration. Thus, in the appendices to RLEA's Brief to the Hearing Examiner it requested that the labor conditions include provisions substantially identical to Sections 4, 5, and 9.[1] The Hearing Examiner's Recommended Report and Order did not impose Sections 4, 5, and 9 as labor conditions. Yet, RLEA's Exceptions to this Recommended Report and Order make no mention of these provisions,[2] though I.C.C. Rules of Practice § 1.96(a), 49 C.F.R. § 1.96(a), provides that

> "Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately."

Although RLEA's jurisdictional statement in this Court asserts that the Commission's original order of November 7, 1962 was ambiguous, "misleading," "vague," and "confusing" with respect to the inclusion of Sections 4, 5, and 9 of the Washington Agreement (J.S., pp. 4, 5), RLEA's petition to the Commission for reconsideration of that order was completely silent as to Sections 4 and 5, although it did make two cursory references to Section 9 (pp. 20 and 28).[3] Again, the Commission's Rules of Practice,

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[1] As to Sections 4 and 5 see Article 10 of App. A and C of App. B. As to Section 9 see Article 2 of App. A.

[2] The United States, U.S. Memo., p. 14 n.9, refers to No. 16 of RLEA's Exceptions, but this reference is inapposite, because Exception No. 16 concerned only compensatory conditions relating to so-called "fringe benefits."

[3] The Commission concedes that RLEA's petition for reconsideration "raised no question as to the inclusion or exclusion of Sections 4 and 5" of the Washington Agreement (I.C.C. Motion to Affirm, p. 5).

§ 1.101(d), 49 C.F.R. § 1.101(d), require quite clearly that

> "the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in § 1.96(a) . . . ."

In short, Sections 4 and 5 were at no time asked for after their rejection by the examiner, and Section 9, though belatedly sought on reconsideration, was not properly before the Commission on exceptions. The Commission was thus under no obligation to rule on these points, and its normal practice is not to do so. See *T. C. Wheaton Co.* v. *Baltimore & O.R.R.*, 139 I.C.C. 636, 637-38 (1928); *Fidelity Cotton Oil Co.* v. *Alabama & V. Ry.*, 47 I.C.C. 542, 543 (1917).

In this situation, the only substantial question is not whether the Commission erred in failing to give reasons, but whether the issue of inclusion of Sections 4, 5, and 9 is open at all on judicial review. This Court said in *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952), reversing a District Court for passing on a point not raised before the Commission:

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against *objection made at the time appropriate under its practice*" (emphasis added).

Only one week after its decision in *Tucker Truck Lines*, this Court held that the principle there announced would apply to bar questions not raised be-

fore the Commission in a petition for reconsideration. In *W. J. Dillner Transfer Co.* v. *United States*, 101 F. Supp. 506 (W.D. Pa. 1951), the issue was whether a hearing examiner was properly qualified. The District Court refused to reach the point. It cited I.C.C. Rules 96(a) and 101(d) (the predecessors of §§ 1.96 (a) and 1.101(d), quoted above in pertinent part) and held that an issue not presented on petition for reconsideration as required by those rules was not open to judicial review. 101 F. Supp. at 509-10. *Cf.* Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9); 3 Davis, *Administrative Law Treatise* § 20.06, at 92 (1958). On appeal to this Court, the following order was entered:

> "*Per Curiam.* Judgment affirmed. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, decided November 10, 1952." 344 U.S. 883 (November 17, 1952).

Accord, J. H. Nowinsky Trucking Co. v. *United States*, 195 F. Supp. 748, 751 (W.D. Wis. 1961); *Gateway Transp. Co.* v. *United States*, 173 F. Supp. 822, 828 (W.D. Wis. 1959). There is a double ground for applying this rule to the issue of the inclusion of Sections 4 and 5 of the Washington Agreement. RLEA did not ask for the inclusion of those provisions either in its Exceptions to the Examiner's Recommended Report or in its Petition for Reconsideration by the Commission. The force of the rule is in no way diminished by the fact that Sections 4 and 5 were before the Examiner. See *King Van Lines, Inc.* v. *United States*, 220 F. Supp. 551, 554-55 (D. Kan. 1963) (alternative holding). As for Section 9, it was not properly preserved by an exception and therefore its mention in the Petition for Reconsideration came too late. See

Monumental Motor Tours, Inc. v. *United States*, 110 F. Supp. 929, 932-33 (D. Md. 1953).

It follows that this Court would be entirely justified in affirming the dismissal of RLEA's complaint, in respect of all questions concerning Sections 4, 5, and 9 of the Washington Agreement, on the ground that these questions were never properly presented to the Commission for consideration and decision. We are not now asking this Court for such relief. We do submit, however, that under the decisions of this Court the Commission cannot now be assailed for failing to give reasons for omitting Sections 4, 5, and 9 from the labor conditions. The Commission was never asked to include these provisions. Far less was it ever asked to include these provisions in terms clear enough to require it to give explicit and detailed reasons for their omission. Even the United States admits that appellants "were far from clear and persistent in maintaining before the Commission their request for Sections 4 and 5 . . ." (U.S. Memo., p. 13 n.9). The issues were therefore never "presented" within the meaning of Section 8(b) of the Administrative Procedure Act, and the Commission did not err by failing to give reasons for its disposition of them. Beyond that, no one ever suggested to the Commission, by Petition for Reconsideration or otherwise, that its findings or reasoning were defective under Section 8(b), so the whole question is in any event not properly before the courts. *United States* v. *L. A. Tucker Truck Lines, Inc., supra*, 344 U.S. 33. It would, therefore, be improper and unfair to reverse the Commission and the District Court summarily on this belatedly suggested ground.

II. THERE IS NO WARRANT FOR A SUMMARY AFFIRMANCE ON THE THEORY NOW SUGGESTED BY THE COMMISSION

The Commission has filed a paper captioned "Motion to Affirm" (M.A.). This is a misnomer. The Commission is asking this Court to enter a judgment that will have a legal effect entirely different from the legal effect of the judgment that was entered by the District Court. In reality, therefore, the Commission is not asking that the District Court's judgment be affirmed, but rather that it be vacated and replaced by a new and entirely different judgment to be formulated *de novo* by this Court. In the District Court, as all parties agree, the case was presented on the assumption that the Commission had not imposed Sections 4, 5, and 9 of the Washington Agreement. The thrust of RLEA's complaint was that this omission rendered the Orders inadequate under Section 5(2)(f). Southern and Central vigorously contested this assertion, as did the Commission itself.[4] The Court held the labor conditions valid. It thus rejected RLEA's contention. It did so on the premise shared by all parties, that the conditions had not included the provisions of the Washington Agreement now in dispute. After the Court had entered judgment, the Commission unilaterally and without notice purported to alter the premise on which the case had theretofore proceeded. True, through its counsel it notified the Court of its action after the fact. But no request was made that the Court's judgment be modified to take account of the Commission's new interpretation of what it had done. Instead, the Commission stood by and allowed the case to be appealed to this Court, and now asks that

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[4] See I.C.C. Br. in No. 3004, E.D. Va., pp. 13-21. The United States chose to take no position on the merits.

the District Court's judgment as to the Washington Agreement be affirmed

> "upon the stated ground that the conditions prescribed by the Commission for the protection of employees incorporate Sections 4 and 5 of the Washington Agreement" (M.A., p. 25).

This novel request is not entitled to serious consideration. It is disrespectful of the District Court because it seeks summary affirmance on a basis never presented to or considered by that Court. It seeks summary relief which the Solicitor General apparently recognizes is not appropriate. It attempts to foreclose the railroads' opportunity to contest the validity of a Commission order attempting to impose Sections 4, 5, and 9 of the Washington Agreement. If the District Court's judgment should be "affirmed" on the proffered ground, Southern and Central would never have been able to present to any Court the argument—tendered by their complaint in *Southern Ry.* v. *United States*, C.A. 3276, E.D. Va., ¶ 19(a), now pending in the District Court—that Section 5(2)(f) does not permit, at least on the present record, the imposition of such conditions.

The Commission recognizes the existence of this objection to its request but attempts to brush it aside by the offhand statement that "[t]here can be no serious question as to the Commission's *power* under Section 5(2)(f)" to impose the equivalent of Sections 4 and 5 of the Washington Agreement (M.A., p. 13). On the contrary, there not only can be but are the gravest questions of such power. The Commission itself said in the Court below of Sections 4 and 5:

> "Such a novel requirement has never been incorporated in any set of protective conditions adopted

> by the Commission." I.C.C. Br., No. 3004, E.D. Va., p. 13.

And of Section 9 of the Washington Agreement it said:

> "The Commission has not in this or prior proceedings required carriers to pay a lump-sum separation allowance in lieu of all other benefits at the option of the employee." *Id.* at 23-24.

Sections 4 and 5, moreover, would raise, if imposed, fundamental questions of the scope of Section 5(2)(f). They are not directed to compensation of employees affected by carrier consolidations. They concern instead the anterior and radically different question whether consolidations—even after Section 5(2) approval by the Commission—may be vetoed by employees. Their imposition would thus raise issues similar to those created by RLEA's now-discredited claim for a "job freeze"—a claim rejected by this Court in *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961). The opinion in that case, in reviewing the history of the Commission's administration of Section 5(2)(f), contains language applicable here:

> "The Commission began imposing compensatory conditions, and only compensatory conditions, in proceedings involving § 5 transactions." 366 U.S. at 177.

We are not suggesting that this Court should now hold that on the present record the Commission lacked power to impose Sections 4, 5, and 9 of the Washington Agreement. On the contrary, our point is that this is a substantial question that deserves a full hearing and careful judicial consideration. Southern and Central have never had a hearing on that question either

before the District Court or here, and this Court should not determine the merits of that question summarily and without a full hearing.[3]

III. THE UNITED STATES AND THE COMMISSION CORRECTLY URGE THAT APPELLANTS' TECHNOLOGICAL-INNOVATION ISSUE IS WITHOUT SUBSTANCE

Both the United States (U.S. Memo., pp. 18-20) and the Commission (M.A., pp. 23-25) take the position that the third question presented by appellants (J.S., p. 5) is without substance. We agree. This issue is whether the Commission violated Section 5(2)(f) by failing to require protection for employees affected not by the Southern-Central consolidation itself, but by technological improvements that might come about subsequently to the consolidation.

The basic intent of Congress in enacting Section 5(2) was to facilitate railroad consolidations. Congress believed that consolidations would restore the ailing rail-

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[3] A possible alternative would be to note probable jurisdiction and then hear argument on the Commission's power to impose Sections 4, 5, and 9. This disposition of the "Motion to Affirm" would at least have the virtue of allowing the railroads to have a day in court on this issue. It would be objectionable, however, because it would place this Court in the position of passing on issues never presented to or decided by the Court below. *Cf.* Massy v. Kendall, 209 F.2d 250, 254 (Em. App. 1954). If there were any merit at all to the Commission's present position, a proper solution would be to remand the cause to the District Court with instructions to hear argument on (1) whether the Commission imposed the disputed provisions, and (2) whether, if so, the Commission acted in accordance with § 5(2)(f) of the Interstate Commerce Act. The case could, on remand, be consolidated with C.A. 3276, and the whole controversy could at some future time come back up to this Court in a far more orderly posture than at present. Or, even better, this appeal could be held until C.A. 3276 is decided—as Southern and Central have asked. Thereafter, if C.A. 3276 is appealed, it can conveniently be consolidated with this case.

road industry to health. The welfare of railroad employees was also given careful consideration. Congress, by Section 5(2)(f), entrusted to the Commission the duty of imposing upon consolidating carriers "fair and equitable" conditions for the benefit of "the railroad employees affected." But there was no intent to require a job freeze or to preserve employees' positions absolutely. *Brotherhood of Maintenance of Way Employes* v. *United States, supra*, 366 U.S. 169. Nor was there any intent that all employees of consolidating carriers be ever thereafter insured against the adverse effects of internal economies or technological improvements. The statute requires only that employees affected by the approved consolidation itself, as a proximate result thereof, be given monetary compensation. No inhibitions are placed on improvements in the art of railroading that might be traceable in part to financial strength that in turn has followed the approved consolidation. Such improvements might well have come about entirely apart from the acquisition of control approved by the Commission. But even if they are in some immeasurable degree partly attributable to that transaction, the causal connection is too remote, indirect, and insubstantial to be of legal significance.

Appellants argue for the broadest possible meaning of the statutory term "employees affected." Their position would frustrate the basic purpose of Section 5(2). In effect, it would deprive unifying carriers of all the benefits and future economies made possible by technological improvements, on the sole ground that such improvements follow, in point of time, a Commission-approved unification. Appellants ask this Court to ignore the fact that Congress, by using the relatively imprecise term "railroad employees affected," has chosen to confide to the Commission, an expert body,

the further definition and articulation of the term. *Cf., e.g., Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). Here, in the exercise of a reasoned discretion and on the basis of the record before it, the Commission held that employees displaced or dismissed by reason of internal economies are not "affected" by the transaction within the meaning of Section 5(2)(f). The District Court was right in concluding that in doing so the Commission was well within the area of choice confided to it by Congress. Compare *In re Florida E. C. Ry.*, 171 F. Supp. 512, 518-20 (S.D. Fla. 1959), where another court, in reviewing the Commission's approval of a plan of reorganization and concurrent acquisition of control under Section 5(2), upheld the Commission's "exercise of enlightened discretion" in refusing to prescribe conditions to protect employees against loss caused by internal economies that might later be undertaken by the reorganized company.

CONCLUSION

Intervenor-appellees Southern and Central adhere to their request that disposition of the jurisdictional statement be deferred pending a decision by the District Court for the Eastern District of Virginia in C.A. 276.[1] If this request is not granted, it is submitted

[1] The United States, the Commission, and RLEA have asked the District Court to stay C.A. 3276 pending disposition of this appeal by this Court. Southern and Central have opposed this request. Even if the District Court should grant the request prior to the time that this Court can act upon the present papers, we submit that this Court should nevertheless grant our Motion to Defer. If this Court grants our Motion, it may be assumed that the District Court would defer to this Court's view that the orderly administration of justice will be served by awaiting a decision in C.A. 3276 and would proceed forthwith to decide that case.

that probable jurisdiction should be noted. This Court is the only appellate tribunal before which this case can come. The issues raised are sufficiently important to deserve full and careful consideration. For these reasons, if our Motion to Defer is not granted, the summary disposition sought by the United States and the Commission should be denied.

Respectfully submitted,

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